No. 96-1357

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

BRUCE SMITH, as personal representative of Ingrid Smith, Deceased,

Petitioner,

vs.

THE SOCIALIST PEOPLE'S LIBYAN ARAB JAMAHIRIYA; LIBYAN EXTERNAL SECURITY ORGANIZATION, also known as Jamahiriya Security Organization; and LIBYAN ARAB AIRLINES,

Respondents,

ABDEL BASSET ALI AL-MEGRAHI, and LAMEN KHALIFA FHIMAH,

Defendants.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

PETITIONER'S REPLY BRIEF

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I.

Petitioner does not argue, as Respondents believe, that violation of any *jus cogens* norm is an implied waiver of immunity under § 1605(a)(1). We do maintain that non-sovereign, extraterritorial, state-sponsored, mass terrorism aimed at the United States waives sovereign immunity under (a)(1) by implication. Such conduct, so far outside the scope of what states do legitimately as sovereigns, forfeits sovereign immunity under the restrictive theory which the FSIA adopted.

Such forfeiture is fully consistent with both *Amerada Hess* and *Nelson*. *Amerada Hess* involved a tort allegedly committed by national armed forces. *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428, 431-33 (1989). Actions by armed forces, inside or outside national boundaries, are distinctly sovereign. In *Saudi Arabia v. Nelson*, 507 U.S. 349 (1993), the issue was whether the exercise of territorial police power was ancillary to commercial activity, not whether it was sovereign. As this Court noted, the State Department "recognized immunity with respect to claims involving the exercise of the power of the police or military of a foreign state." *Id.* at 362 n.5. That Saudi police violence was *de jure imperii* is indisputable.

Although the extraterritorial terrorism of bombing Pan Am 103 was a tort, a mass tort, no principle of statutory construction requires a reading of (a)(5) to limit waiver by implication under (a)(1). Nothing in the text, context or legislative history of § 1605 precludes waiver by implication under (a)(1) from reaching beyond the more limited exceptions of (a)(2) through (a)(5). Similarly,

no inference can properly be drawn that in passing § 1605(a)(7), the 104th Congress presumed that the 94th Congress must have intended (a)(1) not to reach conduct like extraterritorial mass terrorism. Nothing in the text, context or legislative history of (a)(7) expresses a view as to whether the 1976 legislation did or did not immunize such a bombing. Moreover, even if such a view had been expressed by the 104th Congress, it would not be relevant. *See United States v. Price*, 361 U.S. 304, 313 (1960) ("the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one"). All that was clear in April 1996 was that the District Court below had granted sovereign immunity to Libya as to conduct that Congress did not want to be immune. Therefore, the mere passage of (a)(7) expresses no opinion as to what conduct Congress in 1976 intended to be immunized, but rather illustrates the 104th Congress' desire to take no chances that such bombings would lack a legal remedy.

Of course, the precise boundaries for the scope of (a)(1) waiver by forfeiture resulting from non-sovereign conduct will have to be determined on a case-by-case basis. Wherever set, the boundaries of sovereign immunity should exclude extraterritorial, state-sponsored, mass terrorism not conducted during times of war, aimed at American civilians, by non-military, non-police action, such as in the Pan Am 103 bombing.

II.

Contrary to Respondents' assertion, Libya did not limit its responsibility to pay judgments entered against Al-Megrahi and Fhimah. Instead, it promised to make

good on "*any* compensation that might be incurred by the responsibility" of those two individuals. *See* 2d Cir. Jt. App., at 219 (emphasis added). It contemplated that *some* judgment would be entered and the unconditional language Libya itself drafted extends its commitment to whatever forum issued that judgment. Here, Petitioner merely asks that this Court find that United States courts may exercise jurisdiction over Libya *at least* to the extent necessary to enforce Libya's unequivocal pledge to satisfy *any* judgment which may be entered against Al-Megrahi and Fhimah in a United States district court for their acts of terrorism in violation of United States law.

The plain language and location of the guaranty in the Bishari letter does not support Respondents' efforts to construe the guaranty as conditional. The letter contains a series of declarations grouped under separate headings, each distinct and independent of the others – no one refers to any other, nor indicates any interdependence. There is no condition of acceptance in an introduction or conclusion. The only purported condition of acceptance is in the final paragraph of the second section which relates solely "to the issue of terrorism" and not at all to the matter of "compensation." *See* 2d Cir. Jt. App., at 218. By its literal terms, therefore, this purported condition does not apply to the "compensation" and guaranty undertakings listed under a separate heading. *Id.* at 218-19.

The Respondents also mistakenly rely on the observation that "[t]he communique did not even make oblique reference to legal proceedings in the United States." Resp. Br. at 10. In guaranteeing the payment of judgments against Al-Megrahi and Fhimah for acts of

terrorism against primarily Americans, Libya undoubtedly accepted the likelihood that Americans would pursue judgments in courts of the United States and if necessary, would seek to enforce such judgments against Libya in those same courts.[1]

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[1] Respondents also have asserted that the guaranty required that any legal proceedings be conducted pursuant to international law, not United States law. Resp. Br. at 11. This contention is also entirely without support on the face of the Bishari letter. The only reference in the letter to application of international law is an expression of concern that any trial be conducted in a manner *procedurally consistent* with international law. *See* 2d Cir. Jt. App., at 218. Procedure in a United States court of law is consistent with minimal due process safeguards of international law.

CONCLUSION

For the foregoing reasons and those set forth in the Petition for a Writ of Certiorari, Petitioner Bruce Smith respectfully prays that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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